intention of Parliament must proceed to fill the gap said :—

"The part which is played in the judicial interpretation of a statute by reference to the circumstances of its passing is too well known to need restatement: it is sufficient to say that the general proposition that it is the duty of the Court to find out the intention of Parliament — and not only of Parliament but of Ministers also — cannot by any means be supported . . . . . The second part of the passage that I have cited from the judgment of the learned Lord Justice is no doubt the logical sequel of the first. The Court, having discovered the intention of Parliament, and of Ministers too, must proceed to fill in the gaps. What the Legislature has not written, the Court must write. This proposition, which restates in a new form the views expressed by the Lord Justice in the earlier case of Seaford Court Estates Ltd. v. Asher (65 The Times L.R., 379; (1949) 2 K.B. 481) (to which the Lord Justice himself refers) cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guesswork with what material the Legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act."

As stated in *Maxwell* on Interpretation of Statutes, 9th edition, page 3 :—

"The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning; and, secondly, that the phrases and sentences are to be construed according to the rules of grammar."

In construing the Rule in question, therefore, I am not concerned with any intention other than what is disclosed by the actual words used, and reading the Rule according to the rules of grammar it appears to me (whatever the intention of the draftsman may have been) that the third sub-paragraph of this proviso must be read disjunctively in the manner in which I have set it out earlier in this judgment. I can find no reason to restrict the meaning of that sub-paragraph by importing into it a reference to words which appear to me to have been deliberately confined to sub-paragraph (i).

On the learned President's finding of fact, therefore, that the respondent had these rounds in his possession for his private use and not for trade purposes (a finding which has not been seriously disputed) the respondent in my opinion committed no offence under Rule 6 and was, therefore, rightly acquitted.

For all the above reasons the appeal is dismissed.

Appeal dismissed.

LEOW NGHEE LIM v. REG.

[A.Cr.J. (Taylor J.) December 9, 1955]

[Singapore — Magistrate's Appeal No. 175 of 1955]

Dangerous Drugs Ordinance, 1951, ss. 9 & 37 — Possession of prepared opium — Presumption arising from custody or control — Presumption may be rebutted by circumstances appearing in the prosecution evidence.

This was an appeal from the conviction of the appellant on a charge of possession of prepared opium. The facts were that the Police, apparently acting on information received, raided a coffee shop and in a drawer of the counter found a cigarette tin containing nine small packets of prepared opium. They arrested the shopkeeper, the appellant. The Police did not find any pipe or other utensil. The drawer was not locked; it contained about 15 small books, in which sales to credit customers were entered and other articles indicating that the appellant and his assistants all had access to the drawer. The learned Magistrate convicted the appellant of possession of the opium.

Held: (1) on the facts the learned Magistrate was wrong in holding that the assistants did not have access to the drawer; (2) the facts showed that the appellant and his assistants had joint control of the drawer in which the tin of opium was found; (3) the circumstances of the case including the fact that the quantity of opium was small, show possession by one person and are equally consistent with the possession being that of one of the assistants; (4) therefore the presumption under s. 37 of the Dangerous Drugs Ordinance, 1951, did not operate in this case, so as to make the appellant guilty of possession of prepared opium.

Meaning of "possession" expounded and discussed.

Semble: (1) the characteristics of "possession" stated in **R. v. Mak Thim**(1) do not apply, without qualification, to the Dangerous Drugs Ordinance; (2) the presumptions against a person accused under the Dangerous Drugs Ordinance, do not necessarily require rebuttal by defence evidence. They may be rebutted by circumstances appearing in the prosecution evidence; (3) the inferences to be drawn from control and custody depend, in part, on whether the quantity is suggestive of trafficking or of individual consumption; (4) a bare carrier does not have possession but if he has knowledge that the goods carried include opium he may be convicted of abetment of possession.

Cases referred to :—

(1) *R. v. Mak Thim* (1949) M.L.J. 54.

(2) *R. v. Sleep* (1861) 8 Cox, C.C. 472; Le. & Ca. 44.

MAGISTRATE'S APPEAL.

M. B. Brash for the appellant.

J. F. McWilliam (Crown Counsel) for the respondent.

Taylor J. : — This is a Chandu Appeal. Police, apparently acting on information received, raided a coffee shop and in a drawer of the counter found a cigarette tin containing nine small packets of prepared opium; they arrested the shopkeeper. They did not find any pipe or other gear. The drawer was not locked; it contained about 15 small books, in which sales to credit customers were entered, and other articles indicating that the shopkeeper and his assistants all had access to the drawer and in fact used it. The shopkeeper was convicted of possession of the opium. He now appeals.

The defence at the trial was that the facts did not show that the accused had possession of the opium because he used the drawer jointly with others. The learned Magistrate in a very long and careful judgment rejected this defence for two main reasons. The first

was his view that under section 37 of the Dangerous Drugs Ordinance the burden of proving his innocence is on the accused. This is an over statement — the section has the effect of shifting the burden of proof of particular facts but that does not amount to shifting the general burden. The second reason was that he disbelieved the evidence of the accused who was the only defence witness and therefore held that the case for the prosecution was unrebutted.

Section 9 of the Ordinance contains an absolute prohibition of the possession of opium.

It is for the prosecution to establish possession but not necessarily by their own evidence alone, because section 37 provides that on proof of specified facts, certain other facts shall be taken to exist, unless the accused can show that they did not exist. Three of these provisions are invoked in this case, one under paragraph (g) and two under paragraph (d) which are to the following effect. If any dangerous drug is concealed in any premises it shall be presumed to have been so concealed with the knowledge of the occupier. Any person who has custody or control of a drug shall, until the contrary is proved, be deemed to have possession and to know the nature of the drug.

The Magistrate's reasoning was this :—

> The opium was concealed in the premises. It is presumed to have been concealed with the knowledge of the accused. As he knew it was in the drawer of his counter he had custody. If he had custody he is deemed to have had possession. Therefore he is deemed guilty until he disproves possession. As to what constitutes "possession" reference was made to **Mak Thim's**(1) case. His own evidence was disbelieved. He disproved nothing. He is deemed guilty of possession.

In my view this argument takes insufficient account of the particular facts proved. An accused is entitled to the benefit of anything which can be elicited from the prosecution evidence; the onus is on the prosecution to adduce convincing evidence of the facts necessary to raise a presumption before the onus on any issue is shifted. The opium was in a cigarette tin and in the same drawer there were the account books, some packets of cigarettes and also some money. This may have been the assistant's money. It is not likely that this drawer was also the till of the shop. There were cigarettes for sale on the counter. Those in the drawer were probably not for sale. It is unlikely that anyone would put his tin of opium among tins which might be handed out at any moment. The evidence on these points was not fully elicited. It was however, sufficient to show that the accused and his assistants all used the drawer and it is at least consistent with the case for the prosecution that the opium belonged to an assistant and that the accused did not actually know that it was there. The surrounding circumstances therefore went some way towards rebutting the presumption of knowledge before the accused gave evidence at all. Also the circumstances did not exclude the possibility that some enemy of the accused had "planted" the opium in the drawer and led the police to it. These points were not considered by the Magistrate.

Next the Magistrate says that if the opium was concealed in that drawer with the knowledge of the accused, it follows that he had custody of it. I question this proposition. It is clear from the Ordinance that custody is something less than possession. I take that argument to be that as the accused personally managed his shop he had custody of everything in it but the plain truth is that, broadly speaking, the accused had not mere custody but actual possession of his shop and its contents. The question is whether he had possession of the tin of opium. To say that he had custody of it is to distinguish it from the other contents of the shop. The ground of this distinction is not stated. Except where the Ordinance otherwise provides, every doubtful point must be taken in favour of the accused. At this stage the Magistrate had found only that the opium was concealed in the drawer, which is not disputed, and he had presumed, as he was bound to do, provisionally, at that stage, that the accused knew it was so concealed. There the matter rested. There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession. The finding of custody means that at that stage the Magistrate had held that the opium belonged to somebody else, probably an assistant, and that the accused was taking care of it for him. He might have called his assistants to say that the tin containing opium did not belong to him but he did not do so. The Magistrate does not say, in terms, that he drew an inference adverse to the accused from his failure to call the assistants but he comments twice on the absence of other evidence and it is hard to think of anyone else who could have been called. The assistants could not have said that the tin did not belong to the accused without exposing themselves to the charge that it belonged to them, or one of them, and this is a reasonable explanation of their absence. In the circumstances the accused could hardly do more than swear, as he did, that the opium was in the drawer without his knowledge. If believed,

that was enough. But he was not believed. The Magistrate explained, with commendable care, his reasons for rejecting the evidence of the accused. He said the demeanour of the accused in the box was bad. It certainly was very bad but demeanour is a most unsafe guide. It sometimes happens that a perfectly honest man becomes confused and contradictory in the witness box whereas many rogues have excellent demeanour. Great stress was laid on the fact that the accused did not, on the spot, reproach the employee who was present, and it was held that this part of his conduct was inconsistent with his innocence. I cannot accept this. A man who is caught in apparent possession of contraband may well say : — "It is not mine — it must belong to one of the assistants" whether he be guilty or innocent and equally, realising that appearances were strongly against him, he may submit quietly to arrest, whether guilty or innocent.

There was a question as to whether the accused had one assistant or two. One only was present at the time of the raid. A detective said that he had enquired and found that only one was employed. This was obvious hearsay and should not have been admitted. The accused said he had two and this was the only admissible evidence on the point. The Magistrate found, as a point against the accused, that he had only one; this was a misdirection. Also the Magistrate commented strongly on the fact as the fifteen books were not produced by the defence he could not ascertain whether they were customers' account books or not and as he disbelieved the accused he held that there was no evidence that the assistants had access to the drawer. The prosecution agreed that the books were in the drawer. It was a natural inference that they related to the business. The omission to produce them did not properly raise an inference adverse to the defence. Also there were other articles in the drawer. On the prosecution evidence there were distinct indications that the assistants did have access to the drawer and the finding that they did not cannot be supported. It was a misdirection on a material point.

The Deputy Public Prosecutor's argument was to this effect.

Accused had control of the business and, particularly of the drawer. Others had access to the drawer, but not control. If an assistant put opium there the accused should have told him to throw it away. Accused is deemed to be in possession. And to have known the nature of the drug. **Mak Thim**[1] does not apply. For the purpose of this Ordinance "possession" means knowledge that the opium is present combined with power of disposal. As to the meaning of "possession" reference was made to *Stroud* (3rd Edn.) p. 2245 "Power to deal with it to the exclusion of other persons". But under the Ordinance possession need not be exclusive. The presumption could be that he had joint possession with the assistants. If to his knowledge there was opium within his disposing power the accused was guilty of possession. Presumption (d) applied. As he did not rebut it, he was rightly convicted.

A number of cases were cited and I have since consulted some others. I do not propose to go through them. It is clear that they conflict and it is therefore necessary to go back to first principles. I must, however, comment on the misuse which has been made of the dictum in *Mak Thim*[1]. There the Court specified certain characteristics without which, they said, (except by statute) possession cannot be criminal. The words in brackets are vital. They were deliberately inserted to show that the ruling is not applicable where the meaning of the word "possession" is controlled by the particular statute. Apart from this, every judgment must be read as applicable to the particular facts proved. General expressions are to be understood not in their apparently wide sense, as expositions of the whole law on the point, but governed and qualified by the facts of the particular case. Attempts have been made to construe the words of the Drugs Ordinance by applying the dictum in *Mak Thim*[1] as though it were a definition by the Interpretation Ordinance. This is contrary both to the general principle and to the terms of the dictum itself, and likely to lead to confusion, as it did in this case at first instance.

The word "possession" is one of the most difficult of English words. It is derived from *posse* to be able and *sedere* to sit or occupy. The fundamental concept is power of occupation; primarily this referred to land and later the meaning was extended to power of user of a chattel. The primary lay meaning of possess is to hold as property, to own. The primary legal meaning of possess is to have possession, as distinct from ownership. This is well illustrated by the popular phrase for a sheriff's agent, "A man in possession," who really has only custody. Shakespeare more accurately called him a bum bailiff. In this Ordinance custody is distinguished, and I think "possession" means possession irrespective of whether the possessor is the beneficial owner. Probably the most helpful definition of possession is :—

"The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons."

This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge. The patriarch Benjamin, *Genesis 44*, was clearly in possession of his sack of corn but he was not, in truth, in possession of the silver cup which had been "planted" in it, entirely

without his knowledge. The prisoner *Sleep*[7] had a mixed lot of copper bolts, some of which bore the Queen's mark. He knew he had copper bolts and therefore he was in possession of the whole lot. The question was whether he knew that some of them were so marked. How much a man knows about things in, or apparently in, his possession is a matter of fact, to be inferred from all the circumstances.

In some of the cases it has been said that without knowledge there can be no possession. In others, "in possession" has been read as "knowingly in possession" by application of the doctrine of *mens rea*. In some instances either view leads to the same result but not in all. The dicta do not make clear what degree of knowledge is meant. Also, in some of the statutes, "possession" and "knowledge" have been treated separately and much confusion has resulted.

The word "possession" is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him. The Ordinance deals both with opium and with other drugs. Possession of opium is prohibited absolutely. Possession of drugs in general is not prohibited absolutely because many drugs are familiar household articles; it is only dangerous drugs which are prohibited. The special presumption as to knowing the nature will therefore seldom apply to opium; it will more frequently apply to other drugs. A man might know that he had a white powder, and therefore be in possession of a drug, but he might not know whether it was bicarbonate, a common household drug, or heroin, a dangerous drug of similar appearance. Such a case would resemble that of *Sleep*[2] *supra*. The distinction is not applicable in the present case but is mentioned here because counsel argued that the word "possession" is used in different senses in the Ordinance. I do not think that is so. I think the word possession is used consistently in the Ordinance in its ordinary, but imprecise, sense.

It has also been said that intention to exercise the power of disposal is a necessary element of possession. This cannot be supported as part of a general definition. A woman is undoubtedly in possession of her wedding ring but as a rule she does not intend to dispose of it; many are buried wearing it. But she can pawn it, in case of need. Similarly with guilty possession. In general a thief intends to dispose of his loot but the rich collector who filched a rare stamp and the crazy artist who took the Mona Lisa, in order to gloat over them in private, were equally thieves. Intention is a separate matter.

The dictionary definition brings in the idea of exclusiveness. It is often said that "possession must be exclusive." This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.

Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that "possession must be exclusive" is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

The case for the appellant is, briefly, that at the highest he had only joint possession of the drawer and therefore it should not be inferred that he had possession of the opium which may have belonged to one of his assistants. In any case there is no evidence whatever that he knew the opium was there — only the presumption and he rebutted it by his own denial on oath.

The evidence admittedly fell short of showing possession of the opium but the Magistrate found that the accused had custody. The Deputy Public Prosecutor abandoned this argument and fell back on control. The presence of the account books indicates that the accused retained control of the drawer, he allowed the assistants to keep some of their personal possessions in it but it was not set apart for them. It was used concurrently for two purposes — for their odds and ends and for the business books which were in use from hour to hour. Any one of the three persons might open the drawer at any moment and might open the tin. They had joint control of the drawer. But they did not have joint control of the opium unless all three knew it was there.

If the quantity had been so large as to suggest trafficking it would have been natural to infer that all three were concerned and that they had joint possession. It is highly improbable that any one of them would leave a large quantity where the others might so easily find it, unless all were participating. But the quantity is agreed to be so small as to be, in all probability, the private supply of one person so there is no inference of fact that more than one person knew it was there.

The accused is presumed by law to have known because he is the occupier. The opium was in the drawer. Either it belonged to the accused, in which case it was in his possession, or it belonged to one of the assistants, who kept it there, to his presumed knowledge.

That, however, does not mean that the opium was in the control of the accused. The Deputy Public Prosecutor said that the accused, knowing the opium was there, could order the assistant concerned to throw it away. That may be true but it sets up control of the assistant, not control of the opium.

This raises a point which, so far as I know, has not been examined in any written judgment. The terms possession, custody, control and power of disposal must have the same meaning whether the goods are innocent or contraband. The argument is that because the accused knew the stuff was opium, he could order the assistant to throw it away and therefore he had control. I think this is fallacious. Control must be proved as a fact and it must arise from the relation of the person to the goods, irrespective of whether they are contraband. An example may make this clearer. Suppose that one of the assistants in this case smoked a particular brand of tobacco, not sold in the shop and, to the knowledge of the accused, kept it in that drawer. No doubt the accused could, at any time, tell the assistant to keep his tobacco somewhere else. He could resume possession of drawer. But so long as he allowed the assistants to keep their small personal things in the drawer, the things were in their control, not his. He could not reasonably order them to throw away harmless tobacco, consistently with the existing arrangement. The argument for control is based solely on the contraband nature of the thing — not on the circumstances in which it was kept.

A similar point was raised in a recent unreported case. A lorry driver was convicted of possession of opium. It was clear that he was conveying the opium for another man who did not travel on the lorry. On appeal it was contended that he had disposing power because, if he had driven to some other place and sold the opium for his own account the guilty consignor could neither have sued nor prosecuted. This is not correct. Any dishonest carrier or warehouseman can sell the goods entrusted to him but if he does so he first converts his original custody into possession. The elements of possession are the same, whether the possession be innocent or criminal. Honesty is a matter of intention which, as I have said, is not one of the elements. As there was clear evidence that the driver knew the stuff to be contraband it was a case of a bare carrier with guilty knowledge. His conviction for possession was quashed but on the same findings of fact a conviction for abetment of possession was substituted.

In the present case the evidence, with the aid of the presumption of knowledge, does not show more than that the accused tolerated the concealment of the opium, by another person, in a drawer of which he had control. Control raises a question as to the presumption that the accused had possession but, apart from his own evidence, the circumstances show possession by one person and are equally consistent with the possession being that of one of the assistants. This presumption therefore does not operate. Apart from this presumption, however, the facts raise an inference that the accused abetted the possession by an assistant.

This I think is the true view of the case. At the close of the prosecution the accused should have been recharged in the alternative, with either possession or abetment. Both would have depended on the presumption of knowledge from occupancy. The accused would have had only to rebut the presumption that he knew of the concealment. In that situation however, there would have been a doubt as to which of two offences, if either he had committed. His burden would have been lighter. Also, as I have said, the Magistrate misweighed his evidence.

There was material on which he might have been properly convicted but it requires a view of the facts and the law which was not submitted by the Crown either at first instance or on appeal and which the accused might have been able to rebut. It is not a case for retrial.

The appeal is allowed.

Appeal allowed.

Solicitors for the appellant: *Allen & Gledhill.*

PUBLIC PROSECUTOR v. LIEW WAI HING (f)

[A. Cr. J. (Buhagiar J.) December 2, 1955]

[K. L. — Criminal Appeal No. 77 of 1955]

Road Traffic — Motor Vehicles (Registration and Licensing) Regulations, 1954, reg. 19(2) — Using a motor vehicle for a purpose other than the purpose for which a licence is granted — Burden of proof.

The appellant in this case was charged as follows: "That you at about 11.10 a.m. on 18.8.55 at 3¾ mile Ipoh Road, Kuala Lumpur, State of Selangor, being the registered owner of motor vehicle BC 197 did cause the use of the said vehicle on the public roads for a purpose other than the purpose for which the licence was granted, in that the said vehicle was used for the carriage of goods, namely, equipments for a mobile cinema, and you thereby have committed an offence against Regulation 19(2) of the Motor Vehicles (Registration and Licensing) Regulations — LN. 686/54 and punishable under Regulation 50(a) of the said Regulations."

The prosecution called two witnesses. The 1st an Enforcement Officer testified that he stopped and checked the motor vehicle in question, that he found the vehicle was loaded with various articles and that the vehicle